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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SIMON BUTLER,

Plaintiff and Respondent,

v.

KSM HEALTHCARE, INC.,

Defendant and Appellant.

B302991

Los Angeles County

Super. Ct. No. 19STCV18411

APPEAL from orders of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Lann G. McIntyre, Tracy D. Forbath, Kathleen M. Walker, Jeffrey S. Healey and Ashley M. Davies for Defendant and Appellant.

Gharibian Law, Art Gharibian and Valentina Ambarchyan for Plaintiff and Respondent.

When a trial court finds a plaintiff is financially unable to pay the costs of arbitration under an enforceable arbitration agreement, the court must order the defendant either to pay the plaintiff's share of the arbitration costs or to waive its right to arbitrate and to allow the plaintiff's case to proceed in court. (*Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, 90 (*Roldan*).) The *Roldan* rule is a natural extension of California's long-standing public policy of ensuring all litigants have access to the justice system for resolution of their grievances, without regard to their financial means. (*Id.* at p. 94; *Martin v. Superior Court* (1917) 176 Cal. 289, 292–297; *Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.* (2018) 22 Cal.App.5th 970, 978 (*Weiler*); Gov. Code, § 68630, subd. (a).)

The evidence in this case showed plaintiff Simon Butler is on a fixed income, receiving only \$901 of social security benefits a month, all of which he has assigned to his nursing care provider. Based on this evidence, the trial court found plaintiff was financially unable to pay the costs of arbitration under a fee splitting provision that would have required plaintiff to pay approximately \$15,000 to arbitrate his claims for elder abuse and negligence. Thus, under *Roldan*, the court ordered defendant KSM Healthcare, Inc. (KSM) either to pay the entire costs of arbitration or to have its petition to arbitrate deemed denied. KSM opted for the latter. It now challenges the conditional ruling and a ruling denying its request to modify the arbitration agreement to allow arbitration to proceed with a single arbitrator. We conclude the evidence was sufficient to support the trial court's finding, and the court correctly applied the *Roldan* rule. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff sued KSM asserting claims for dependent adult abuse, negligence, and violation of resident rights under Health and Safety Code section 1430, subdivision (b). The complaint alleged plaintiff suffered a fall at KSM's nursing care facility, resulting in fractures in plaintiff's calf and ankle bones, due to KSM's neglect.

In response to the complaint, KSM filed a petition to compel arbitration based on an arbitration agreement that plaintiff executed upon his admission to KSM's nursing care facility. The arbitration agreement provides that all disputes regarding medical malpractice and all claims for injury or death arising from negligence or intentional tort are subject to binding arbitration in accordance with the Medical Arbitration Rules of the California Hospital Association. Those rules require a three-arbitrator panel consisting of two party-designated arbitrators and one neutral arbitrator. Under the arbitration agreement, the parties must split the arbitration expenses and fees equally.

In opposition to the petition, plaintiff acknowledged the existence of the arbitration agreement, but argued the fee splitting provision rendered the agreement unconscionable. Alternatively, plaintiff argued the court should apply the *Roldan* rule and order KSM either to pay plaintiff's portion of the arbitration costs or to waive its right to arbitrate the claims. In support of his opposition, plaintiff submitted a declaration from his sister, Andrea Butler, who attested she was familiar with plaintiff's finances; plaintiff resided in a skilled nursing facility due to his need for 24-7 care; plaintiff lived on a fixed income of \$901 a month from social security, all of which he had assigned to the nursing care facility; and plaintiff had no cash

or other tangible assets. Plaintiff also submitted his attorney's declaration, authenticating fee schedules for several arbitrators showing charges between \$525 to \$900 per hour for discovery and arbitration hearings. Based on the fee schedules, plaintiff argued a seven-day arbitration would cost over \$29,400 for the arbitrators' fees alone.

In its reply, KSM argued Ms. Butler's declaration was insufficient to establish plaintiff's inability to pay because it did not lay the foundation for Ms. Butler's familiarity with plaintiff's finances. However, KSM did not file an evidentiary objection to the declaration or move to have it stricken for lack of personal knowledge. KSM also argued *Roldan* did not apply because plaintiff had not sought a fee waiver and because his counsel's website said prospective clients would not pay any fees unless the attorneys won the case. Although KSM suggested it "should be entitled to know whether plaintiff has a contract with his counsel or anyone else, wherein his counsel has agreed to pay for [arbitration costs]," KSM did not file a motion or make any other request to the trial court for this discovery. Instead, KSM argued plaintiff's "attorneys have implicitly conceded their willingness and ability" to pay the fees by remaining silent on the issue.

The trial court conditionally granted the arbitration petition as to the elder abuse and negligence claims, provided that KSM agreed to pay plaintiff's portion of the arbitration fees.¹ In the event KSM refused to pay for the entire arbitration, the court ordered the petition would be deemed denied. The court

¹ The court denied the petition with respect to the violation of resident's rights cause of action, concluding the arbitration agreement did not cover the claim.

found Ms. Butler's declaration was sufficient to establish plaintiff's inability to pay, and it found the arbitrators' fee schedules supported plaintiff's estimate regarding the cost of arbitration. Although the fee splitting clause did not render the agreement unconscionable (because there was no showing of procedural unconscionability), the court concluded enforcement of the provision would "deny[] Plaintiff access to a forum to assert his claims and to vindicate his statutory rights under the Elder Abuse Act."

After the court's ruling, KSM requested plaintiff's counsel agree to a single arbitrator (as opposed to the three-arbitrator panel called for under the agreement), whose fees KSM would cover. Plaintiff's counsel refused the request. KSM then applied ex parte for an order requiring only one arbitrator. KSM argued the court's order to pay the entire arbitration fee for three arbitrators imposed a "great financial burden" on KSM and plaintiff had "no good faith reason" to oppose the modification.

The trial court denied the application, concluding it had no authority to modify the agreement.

KSM elected to have its petition deemed denied and filed a timely notice of appeal.

DISCUSSION

1. *Substantial Evidence Supports the Conditional Arbitration Order Under Roldan*

The primary issue in this appeal is whether the evidence was sufficient to support the trial court's factual finding that plaintiff was financially unable to pay the costs of arbitration. That finding was the necessary predicate to the court's conditional order under *Roldan*. KSM contends the evidence was insufficient, arguing plaintiff's sister's declaration did not lay

a foundation for her knowledge of plaintiff's finances or provide "sufficient detail" of those finances to establish plaintiff's inability to pay.² The contention attacks the sufficiency of the evidence to support the trial court's factual finding and is subject to our substantial evidence standard of review. (*City of Vista v. Sutro & Co.* (1997) 52 Cal.App.4th 401, 407 (*City of Vista*) ["On appeal we must review the court's factual ruling on arbitrability under the substantial evidence test."].)

Our analysis begins with *Roldan*. The plaintiffs in *Roldan*, a group of elderly individuals, sued the lawyers who had represented them in litigation concerning toxic mold contamination in their apartment building. (*Roldan, supra*, 219 Cal.App.4th at p. 90.) They claimed financial elder abuse, conversion, and breach of fiduciary duty, among other causes of action. (*Id.* at p. 92.) After they were ordered to arbitrate under an arbitration clause in one defendant's retainer agreement, the plaintiffs filed a motion in the superior court "seeking an order decreeing they [were] not required to pay any portion of the 'up front' cost of the arbitration between themselves and [the defendant]." (*Id.* at pp. 92–93.) The plaintiffs had been declared indigent, and they argued requiring

² KSM takes issue with the trial court's analysis of unconscionability, arguing the court should not have assessed substantive unconscionability after finding the agreement was not procedurally unconscionable. We need not reach the issue. Even if the trial court had concluded the agreement was not substantively unconscionable, *Roldan* still would have required the court to enter its conditional order upon a finding that plaintiff was financially unable to pay his portion of the arbitration costs. (See *Roldan, supra*, 219 Cal.App.4th at pp. 95–96.)

them to pay arbitration fees in advance would preclude them from pursuing their claims. (*Id.* at p. 93.) The trial court denied the motion, concluding the plaintiffs' financial status was irrelevant to enforcement of a contractual arbitration provision. (*Ibid.*)

The *Roldan* court reversed. Although the trial court's orders compelling arbitration were presumed valid (*Roldan, supra*, 219 Cal.App.4th at p. 95), the reviewing court held "California's long-standing public policy of ensuring that all litigants have access to the justice system for resolution of their grievances, without regard to their financial means" nonetheless required a judicial assessment of the plaintiffs' ability to pay arbitration costs. (*Id.* at p. 94.) If the evidence showed the plaintiffs lacked the means to pay their share of the costs, the *Roldan* court reasoned forcing the matter to remain in the arbitration forum would effectively deprive them of any forum to resolve their claims against the defendant. In view of California's strong public policy of ensuring access to the justice system, this was unacceptable. (*Id.* at p. 96; see also *Weiler, supra*, 22 Cal.App.5th at pp. 978–979 ["from a public policy standpoint, a defendant accused of wrongdoing should not be permitted to avoid potential liability by forcing the matter to arbitration and subsequently making it so expensive that the plaintiff eventually has no choice but to give up"].)

In fashioning a remedy, the *Roldan* court recognized it did not have the authority to order the arbitrators to waive their fees or to order the defendant to pay the plaintiffs' share of them. (*Roldan, supra*, 219 Cal.App.4th at p. 96.) Thus, on remand, if the trial court found any of the plaintiffs were unable to share the costs of arbitration, then the defendants should be given a choice:

“[E]ither pay[] that plaintiff’s share of the arbitration cost [and remain in arbitration,] or waiv[e] its right to arbitrate that plaintiff’s case.” (*Ibid.*) Giving the defendant this choice, the *Roldan* court reasoned, would ensure the plaintiffs had an affordable forum for resolving their claims without stripping the defendant of its contractual right to arbitrate, if it so desired. (*Ibid.*)

KSM argues *Roldan* is distinguishable because the retainer agreement there had an “awkwardly incorporated” arbitration clause that appeared on “the only page of the agreement neither initialed nor signed by the client.” (*Roldan, supra*, 219 Cal.App.4th at p. 91, italics omitted.) The distinction makes no substantive difference. Our trial court found KSM’s arbitration agreement was enforceable. The *Roldan* court likewise assumed that the arbitration agreement there was enforceable and that the underlying orders compelling arbitration were correct. (*Id.* at p. 95.) The “only issue,” according to the *Roldan* court, was “whether [the] plaintiffs, each of whom was subsequently granted permission to proceed in forma pauperis in the trial court, could likewise be excused from the obligation to pay fees associated with arbitration.” (*Ibid.*) Guided by California’s long-standing public policy of ensuring all litigants have access to the justice system regardless of their financial means, the *Roldan* court held the plaintiffs should be excused, as long as the trial court found they were in fact unable to pay.³ (*Id.* at pp. 94–96.)

³ KSM also emphasizes that the agreement in *Roldan* was compulsory and silent as to each party’s share of the arbitration expenses. Again, while these matters may be relevant to the enforceability of the arbitration agreement and whether it is procedurally unconscionable, they are immaterial to the public

Like the reviewing court in *Roldan*, we accept the trial court's determination that the arbitration agreement here was enforceable. Thus, the only issue is whether the evidence was sufficient to support the court's finding that plaintiff was unable to pay the arbitration costs. We conclude it was.⁴

To establish his inability to pay, plaintiff offered a declaration from his biological sister, Andrea Butler. Ms. Butler certified she had "personal knowledge" of the matters stated in her declaration, and she would testify competently to those matters if called and sworn as a witness. She declared she was presently "familiar with Simon[] [Butler's] finances," and offered the following details about his income and living expenses: "Simon lives on a fixed income, compris[ed] of monthly social security benefits of \$901"; he "resides at a skilled nursing facility due to his ongoing need for 24-7 skilled nursing care"; and he "has assigned his monthly social security payments to the facility." Finally, Ms. Butler declared that her brother "has no cash assets" and he "does not own any tangible assets of monetary value."

KSM argues Ms. Butler's declaration was insufficient to support the trial court's finding. It argues the declaration "did

policy of equal access to the justice system that undergirds the *Roldan* rule. (*Roldan, supra*, 219 Cal.App.4th at p. 94; see *Weiler, supra*, 22 Cal.App.5th at pp. 980–981 [explaining the *Roldan* rule "is not about 'unconscionability'"; rather, it is about ensuring "those compelled to arbitrate will not, as a result, be inherently disadvantaged"].)

⁴ KSM does not dispute that the evidence was sufficient to support the trial court's finding that plaintiff's share of the arbitration fees would likely total over \$14,700. We therefore focus on the evidence concerning plaintiff's financial condition.

not lay any foundation” for Ms. Butler’s knowledge of plaintiff’s finances, and KSM says it is “unclear” why Ms. Butler, and not plaintiff, submitted a declaration regarding plaintiff’s assets. Critically, KSM did not object to the declaration in the trial court, as is generally required to challenge the foundation for a witness’s claim of personal knowledge. (See Evid. Code, § 702, subd. (a) [*“Against the objection of a party, [a witness’s] personal knowledge must be shown before the witness may testify concerning [a particular] matter.”* (Italics added.)].) Instead, KSM’s argument and insinuation about plaintiff’s failure to submit his own declaration amounts to little more than an attack on the credibility of Ms. Butler’s assertion that she had “personal knowledge” of plaintiff’s finances. (See Evid. Code, § 702, subd. (b) [*“A witness’ personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.”*]; *Tutti Mangia Italian Grill, Inc. v. American Textile Maintenance Co.* (2011) 197 Cal.App.4th 733, 742 [on petition to confirm arbitration award, witness’ declarations demonstrated they were made on basis of personal knowledge].)

Credibility and factual determinations about whether a witness actually has personal knowledge of the matters she claims is the province of the fact finder—in this case the trial court—and cannot be disturbed on appeal if the evidence affords a reasonable basis for the finding. (See Evid. Code, § 403, Assem. Committee on Judiciary com. [for preliminary fact questions like personal knowledge that “involve the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues,” “[i]t is the jury’s function to determine the effect and value of the evidence addressed to it”].) Here, it was reasonable for the trial court to credit Ms. Butler’s claim of personal

knowledge given her relationship with plaintiff and her testimony about his need for constant nursing care. (See *Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 821 [on substantial evidence review we consider the evidence in the light most favorable to the trial court's determination, drawing all reasonable inferences to uphold it].)

KSM's other criticisms of the declaration are likewise unavailing. KSM argues the declaration "was silent as to whether [plaintiff] has any other sources of income such as stocks, bonds, bank accounts or money market accounts" and "silent as to the amounts in [plaintiff's] bank accounts and whether he receives financial assistance from his family members." But, as we have recounted, Ms. Butler's declaration attests that plaintiff lives on a "fixed income" of \$901 in monthly social security benefits, all of which he has assigned to the nursing care facility that provides him 24-7 care. As for the contents of any bank accounts, Ms. Butler said her brother has "no cash assets."

Finally, KSM contends Ms. Butler's declaration is insufficient because it "omits to address whether [plaintiff's] counsel has in fact agreed to advance all fees and costs for his litigation." KSM bases the argument on a screen capture from counsel's website that includes a statement reading: "[W]e work on a contingency. Simply put – **no fee unless we win your case.**" As it argued in the trial court, KSM insinuates that "[p]erhaps the omission occurred because such an arrangement with counsel would preclude a finding that the client is entitled to a fee waiver." Again, this contention advances a factual dispute that was within the trial court's exclusive province to resolve. (See *Joyce v. United Ins. Co. of America* (1962)

202 Cal.App.2d 654, 659; *City of Vista*, *supra*, 52 Cal.App.4th at p. 407.)

Even if we accept the premise that the website’s statement could mean plaintiff’s counsel might advance arbitration fees (as opposed to attorney fees that otherwise would be charged as incurred), the statement alone plainly did not compel the trial court to conclude this was in fact so. Certainly, plaintiff’s attorneys were not, from an ethical standpoint, obligated to advance the fees for their indigent client. (See *Isrin v. Superior Court of Los Angeles County* (1965) 63 Cal.2d 153, 164 [an attorney having accepted the representation of an indigent client on a contingency fee basis is not “compelled to advance the costs [of litigation] under pain of being found derelict in his duty to his client”].)

Indeed, KSM tacitly concedes this is a disputed factual issue. Thus, in its reply brief, KSM argues this matter should “be remanded with directions for [plaintiff] to provide a copy of his agreement with counsel to the court for in camera review and a determination as to whether his counsel’s promise eliminates the need for a *Roldan* order.” But KSM did not request this relief in the trial court. Instead, it relied on the insinuation that an agreement to advance litigation fees existed as a basis to argue plaintiff’s evidence was inadequate to disprove the possibility that plaintiff may have had some means, other than his personal finances, to pay the arbitration costs. We cannot grant KSM relief that it made a tactical choice to abandon in the trial court. (See *Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, 687 [where litigant chose to rely on his “filings, and on the arguments of counsel” and neither “requested live testimony at the hearing, nor . . . indicate[d] to the court that he wished to have the

opportunity to examine [the opposing party],” he “forfeited his right to obtain relief”).)

The evidence was sufficient to prove plaintiff could not pay his share of the arbitration costs. The trial court did not err in applying *Roldan* and ordering KSM either to pay the entire cost of the arbitration or to have its petition deemed denied. (*Roldan, supra*, 219 Cal.App.4th at p. 96.)

2. The Trial Court Properly Denied KSM’s Request to Modify the Arbitration Agreement

After the trial court’s *Roldan* order, KSM requested plaintiff’s counsel agree to a single arbitrator (rather than the three-arbitrator panel required under the agreement), whose fees KSM would cover. When plaintiff’s counsel refused to modify the agreement, KSM filed an ex parte application asking the trial court to implement the modification over plaintiff’s objection. KSM argued the relief was warranted due to plaintiff’s lack of “good faith” and the “great financial burden” the court’s *Roldan* order imposed on KSM. The trial court denied the application, concluding it had no authority to modify the agreement.

On appeal, KSM fails to address the court’s reason for denying the requested relief. Instead, it argues the court had inherent power under Code of Civil Procedure section 128 to provide for the orderly conduct of proceedings, and the court’s “refusal to regulate the proceedings by controlling the conduct of plaintiff’s counsel, who refused to agree to a single arbitrator in bad faith and for the improper purpose of driving up the cost of arbitration to KSM in the hopes of forcing the case back into court, was an abuse of discretion.” We disagree.

Code of Civil Procedure section 128 authorizes the court to use contempt orders to “preserve and enforce order in its

immediate presence”; to “enforce order in the proceedings before it”; to “provide for the orderly conduct of proceedings before it”; to “compel obedience to its judgments, orders, and process”; and to “control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it,” among other things. Nothing in the statute authorizes the court to reform or modify a contract simply because one party refuses a modification in bad faith.

Courts have authority to reform contracts or to sever unconscionable provisions on a proper showing. (See, e.g., *McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 101 [“An agreement to arbitrate may be enforced if the unconscionable provisions can be severed from the agreement.”].) But even if KSM had requested this relief, it plainly failed to make the necessary showing. Apart from plaintiff’s supposed lack of “good faith,” KSM argued modification of the three-arbitrator requirement was warranted because the court’s *Roldan* order imposed a “great financial burden” that KSM had not originally contemplated. However, the evidence KSM submitted was limited to an attorney declaration that offered no proof of KSM’s financial condition or the purported financial burden it claimed. KSM failed to show it was entitled to modification of the three-arbitrator requirement under any theory of relief. The trial court did not err.

DISPOSITION

The orders are affirmed. Plaintiff Simon Butler is entitled to costs.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.